Anna Hsia (SBN 234179)
ZWILLGEN LAW LLP
235 Montgomery Street, Suite 425
San Francisco, CA 94104
Telephone: (415) 590-2335
Facsimile: (415) 636-5965
anna@zwillgen.com

Attorneys for Defendant
HYTTO LTD., D/B/A LOVENSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

S.D.,

Plaintiff,

v.

HYTTO LTD., D/B/A LOVENSE,

Defendant.

Case No. 4:18-cv-00688-jsw

SPECIALLY APPEARING DEFENDANT HYTTO LTD., D/B/A LOVENSE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM

Judge: Hon. Jeffrey S. White
Date: December 14, 2018
Time: 9:00 a.m.
Courtroom 5, 2nd Floor
1301 Clay Street
Oakland, CA 94612

NOTICE OF MOTION AND MOTION TO DISMISS

TO THIS HONORABLE COURT, AND TO ALL PARTIES AND TO THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on December 14, 2018 at 9:00 a.m. or as soon thereafter as the matter may be heard before the Honorable Judge Jeffrey S. White, Courtroom 5, 2nd Floor of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, CA 94612, defendant Hytto Ltd. D/B/A Lovense ("Hytto"), by and through its counsel, will and hereby does respectfully move this Honorable Court for an order dismissing the First Amended Complaint ("FAC") (ECF No. 33) of plaintiff S.D., on behalf of herself and all others similarly situated, pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim. This motion is based upon this notice and motion, Hytto's memorandum of points and authorities, the declaration of Chris Dabreo, all other papers submitted and filed with this notice, the pleadings and papers on file in this action, all matters judicially noticeable, and on such further documentary evidence and oral argument as this Court may allow at the hearing.

DATED: September 27, 2018

ZWILLGEN LAW LLP

By: /s/ Anna Hsia

Anna Hsia (SBN 234179)
anna@zwillgen.com
Jeffrey Landis (admitted *Pro Hac Vice*)
jeff@zwillgen.com
Attorneys for Defendant
Hytto Ltd., d/b/a Lovense

Anna Hsia (SBN 234179)
ZWILLGEN LAW LLP
235 Montgomery Street, Suite 425
San Francisco, CA 94104
Telephone: (415) 590-2335
Facsimile: (415) 636-5965
anna@zwillgen.com

Attorneys for Defendant
HYTTO LTD., D/B/A LOVENSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

S.D.,

Plaintiff,

v.

HYTTO LTD., D/B/A LOVENSE,

Defendant.

Case No. 4:18-cv-00688-jsw

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING DEFENDANT HYTTO LTD., D/B/A LOVENSE'S MOTION TO DISMISS

Judge: Hon. Jeffrey S. White
Date: December 14, 2018
Time: 9:00 a.m.
Courtroom 5, 2nd Floor
1301 Clay Street
Oakland, CA 94612

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Does a smartphone App developer violate the Wiretap Act when users input information into its App and the App collects that information? Of course not. But that is Plaintiff's complaint. Plaintiff brings Wiretap Act and common law claims against Hytto, a Hong Kong-based company with no employees or offices in the United States, based on its collection of usage data through its own App. Because Plaintiff cannot meet her burden of establishing personal jurisdiction or stating a viable claim, her claims must be dismissed.

First, this court lacks personal jurisdiction over Hytto. Headquartered in Hong Kong, with no offices, employees, or real property in the United States, Hytto is not "at home" in the United States, and thus not subject to general jurisdiction under Federal Rule of Civil Procedure 4(k)(2) (the "federal long-arm statute"). Nor is there specific jurisdiction under the federal long-arm statute where Hytto does not direct sales or marketing activities specifically to the United States. Operating an interactive website accessible in the U.S., or using California-based social media companies for marketing does not suffice. Otherwise, any foreign company that sells products on a website accessible from the United States could be haled into court in any United States jurisdiction based on decisions by U.S. persons to access such websites or purchase such products.

Second, the Amended Complaint fails to state a viable claim. In the latest iteration of her complaint, Plaintiff narrows her Wiretap Act claim to cover only individuals that used the App with a partner. In doing so, she includes irrelevant allegations about her text and video communications with other App users, but the alleged misconduct remains the same: Hytto allegedly "intercepted" a Bluetooth transmission of operational commands sent by an App to a sex toy paired with that App. But the Wiretap Act does not apply to Bluetooth transmissions at all, much less non-content signals used to control connected devices. And even if it did apply, the Wiretap Act expressly permits this conduct by stating the obvious point that a party to the communication (i.e. Hytto as the App provider) cannot "intercept" a communication. The conduct would also fall under the Act's "ordinary course of business" exception, which allows collection of communications in the ordinary course of providing the service—such as sending signals to do exactly what the App was intended to do—control the toy.

The same reasons require dismissal of Plaintiff's common law claims. Her intrusion upon seclusion claim fails because Hytto was a party to any allegedly intercepted communication, and because the routine collection of usage data by an App is not highly offensive regardless of whether the data pertains to the use of a remote controlled TV, thermostat, or sex toy. Her unjust enrichment claim fails because she has not adequately alleged that Hytto unjustly retained any benefit it received from her download of the free, optional, App.

RELEVANT FACTUAL BACKGROUND

I. Hytto and its Offerings

Hytto makes adult toys, like the Lovense Lush vibrator purchased by Plaintiff. FAC ¶¶ 1, 40; Declaration of Chris Dabreo ("Dabreo Decl."), ¶ 3. Hytto is a Chinese company with its principal place of business in Hong Kong. *Id.* It currently has 100 employees, all of whom are located in China, and it has no agents or offices in the United States. *Id.* ¶ 6. It has no real property or bank accounts in the United States. *Id.* ¶¶ 7, 8. Nor does Hytto directly target print, radio, direct mail or internet advertisements to residents of the United States. *Id.* ¶ 9. Like many technology companies, Hytto offers smartphone applications that users can download to their smartphones to use with their Hytto products. FAC ¶ 28. One such application, or "App," is Body Chat. *Id.* No part of the design or implementation of Body Chat took place in the United States. Dabreo Decl. ¶ 11. Body Chat is not needed to use the Lush vibrator or any other Hytto product—customers can use the products without downloading Body Chat. FAC ¶ 1.[1]

Individuals who download Body Chat can pair it with their vibrator and control the vibrator's settings using the App—akin to using a cable company's App to change the channel on a cable box. *Id.* ¶ 29. The Body Chat App on a user's smartphone communicates with a paired vibrator via

[1] *See, e.g.*, Hytto Ltd. (2015). Body Chat [Mobile application software]. Retrieved from https://itunes.apple.com/us/app/body-chat/id726879092?mt=8https://itunes.apple.com /us/app/body-chat/id726879092?mt=8. On a motion to dismiss, courts "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230, 1240 (N.D. Cal. 2008) (citations omitted). The Amended Complaint repeatedly refers to Hytto's website and App, and the Apple and Google Play stores. *See, e.g.*, FAC ¶¶ 12-19, 25, 26, 29-31, 34.

Bluetooth. *Id*. Bluetooth is a local communication system—its range when used with a smartphone (*i.e.*, "Class 2" Bluetooth) is approximately 10 meters.[2] Apple and Android operating systems both enable Bluetooth devices like the Lush to communicate directly with apps like Body Chat.[3]

Body Chat users can also interact with other individuals (such as romantic partners) that have downloaded the App. For example, they can exchange text or video messages with such individuals *Id.* ¶ 30. Nowhere does the Amended Complaint allege that Hytto captures such exchanges. The App is also designed such that when two people are using the App together, either partner's mobile device can select the vibration intensity for the vibrator. *Id.* ¶¶ 29-32. Plaintiff does not allege that the "remote" partner's smartphone communicates directly with the vibrator, as opposed to communicating with the smartphone that is locally paired with the vibrator. Thus, the allegation involving remote communications is essentially the same as those involving local control.

II. Plaintiff and the Original and Amended Complaints

Plaintiff is a citizen of Georgia. FAC ¶ 5. She alleges that she purchased a Lush vibrator from Hytto's website in "mid to late 2016." *Id.* ¶ 40. She alleges that she subsequently downloaded the App, and used the device with a third-party, but does not say whether she used the App privately or publicly as a web performer (which was the predominant use of the App at the time Plaintiff

---

[2] *See* Joshua Wright, *Dispelling Common Bluetooth Misconceptions*, SANS Technology Institute, https://www.sans.edu/cyber-research/security-laboratory/article/bluetooth (last visited Sept. 24, 2018). The Court may take judicial notice of scientific facts which have been well established and generally accepted as irrefutable. *See, e.g., Body Jewelz, Inc. v. Valley Forge Ins. Co.*, 241 F. Supp. 3d 1084, 1090 (C.D. Cal. 2017) (citations omitted) (identifying scientific facts as "things about which courts ordinarily take judicial notice").

[3] Both iOS and Android allow third-party apps to talk to Bluetooth devices. *See Core Bluetooth Framework*, Apple Developer Documentation, https://developer.apple.com/documentation/corebluetooth (last visited Sept. 24, 2018) (describing Core Bluetooth Framework); *Bluetooth overview*, Google Developers, https://developer.android.com/guide/topics/connectivity/bluetooth (last visited Sept. 24, 2018) (describing how Android supports the ability of a device to wirelessly exchange data with other Bluetooth devices). The Court may take judicial notice of facts such as the above that are "not subject to reasonable dispute" because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015) (citations omitted); *see also Sekisui Am. Corp. v. Hart*, 15 F. Supp. 3d 359, 366 n.59 (S.D.N.Y. 2014) (taking judicial notice of publicly available ISO standards); *Cruz v. Anheuser-Busch, LLC*, 2015 WL 3561536, at *8 (C.D. Cal. June 3, 2015), *aff'd*, 682 Fed. Appx. 583 (9th Cir. 2017) (taking judicial notice of product specifications readily available on manufacturer's website).

downloaded it). *Id.* ¶ 42.

Plaintiff filed her original complaint (the "Original Complaint") alleging violations of the Wiretap Act and common law causes of action in January 2018. *See* ECF No. 1. In that complaint, she did not allege that she used the App or her vibrator with another person. *See id.* ¶¶ 34-42. Rather, she claimed that Hytto intercepted communications that she and other class members "sent to their Lovense devices from their smartphones via Bluetooth." *Id.* ¶ 51. Hytto moved to dismiss the Original Complaint for lack of personal jurisdiction, and for a failure to state a viable claim because the Wiretap Act does not apply to local Bluetooth transmissions such as the one allegedly intercepted, and because Plaintiff failed to allege any communication that was intercepted by a non-participant to the communication. *See* ECF No. 25.

Rather than oppose Hytto's motion to dismiss, Plaintiff filed the Amended Complaint, which differs from the Original Complaint in two main ways. First, it adds allegations regarding the accessibility of Hytto's website in the United States, presumably in an effort to argue that this Court has jurisdiction over Hytto under Rule 4(k)(2). *See, e.g.*, FAC ¶¶ 16-17, 19. Second, Plaintiff narrows her Wiretap Act claim to individuals who "downloaded the Lovense Body Chat App and used the App's Long Distance Control feature to control a Lovense brand product." *Id.* ¶ 50. She claims that the App captured "usage information" such as "the date and time of each use" and the "vibration intensity level" selected by such users. *Id.* ¶¶ 36-37.

ARGUMENT

I. The Court Lacks Personal Jurisdiction Over Hytto

Plaintiff's new allegations regarding the mechanics of Hytto's website do not support a finding of personal jurisdiction. Courts may exercise personal jurisdiction only where doing so would not violate due process. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154-55 (9th Cir. 2006). Traditional due process requires minimum contacts with the forum state such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). Where a plaintiff seeks to establish jurisdiction under Federal Rule 4(k)(2), rather than considering contacts between defendant and the forum state, courts "consider contacts with the nation as a whole."

Holland Am. Line Inc. v. Wartsila N.A., Inc., 485 F.3d 450, 462 (9th Cir. 2007). Plaintiff bears the burden to establish such contacts. *See Pebble Beach*, 453 F.3d at 1159. She fails to do so.

A. Hytto Lacks Contacts Sufficient for General Jurisdiction

Hytto is not subject to the general jurisdiction of this Court under Rule 4(k)(2). General jurisdiction is appropriate only where a corporation's contacts with the forum state render it "essentially at home" there. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (alteration in the original). When applied under Rule 4(k)(2), "the inquiry becomes whether a defendant's affiliations with the United States are so continuous and systematic as to render it essentially at home in the United States." *Indag GmbH & Co. v. IMA S.P.A*, 150 F. Supp. 3d 946, 961 (N.D. Ill. 2015). The "paradigm" fora for general jurisdiction are the company's place of incorporation and principal place of business. *Daimler*, 571 U.S. at 137. Only in an "exceptional case" will general jurisdiction be available anywhere else. *Id.* at 139 n.19. *See also Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (the "Supreme Court's recent decision in *Daimler* makes clear the demanding nature of the standard for personal jurisdiction over a corporation"). Hytto is a Chinese company, with its principal place of business in Hong Kong. FAC ¶ 6. It has no employees, offices, or real estate in the United States, and does not pay taxes in the United States. Dabreo Decl. ¶¶ 6-9. It is thus not at home in the United States. *See Indag*, 150 F. Supp. 3d at 961 (finding no general jurisdiction over Italian corporation with its principal place of business in Italy under Rule 4(k)(2)).

B. Hytto Has Not Expressly Aimed its Actions at the United States

This Court also lacks specific jurisdiction over Hytto. Specific jurisdiction is limited to "issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations., S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citation omitted). The Ninth Circuit uses a three-part test to determine whether specific jurisdiction exists:

a) The defendant must purposefully direct its activities or consummate some transaction with the forum or resident thereof . . . thereby invoking the benefits and protections of the forum's laws;

b) The claim must arise out of or relate to the defendant's forum-related activities; and

c) The exercise of jurisdiction must comport with fair play and substantial justice. (i.e., the exercise of jurisdiction must be reasonable).

Adobe Systems, Inc. v. Cardinal Camera & Video Center, Inc., 2015 WL 5834135, at *2 (N.D. Cal. Oct. 7, 2015) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)). Under Rule 4(k)(2), to satisfy the "purposeful direction" requirement, plaintiff must show that defendant expressly aimed its actions at the United States. *See Pebble Beach*, 453 F.3d at 1159.

The relationship between the defendant's suit-related conduct and the forum state "must arise out of [a] contact[] that the defendant *himself* creates with the forum state." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). That is why "the minimum contacts analysis examines the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Axiom Foods, Inc. v. Acerchem Int'l Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (internal quotations and citations omitted). Here, Hytto did not aim any intentional acts at the United States.[4] Plaintiff points to Hytto's (1) offering of an interactive website accessible in the United States; (2) offering of products for sale; and (3) use of companies like Facebook or Twitter for marketing. None suffice.

First, merely offering an interactive website accessible in the United States does not establish express aiming sufficient for jurisdiction. Plaintiff alleges that consumers "must create an account" to purchase products from Lovense.com, and that individuals can join Hytto's "affiliate program" via its website. *See* FAC ¶¶ 13-14. But Plaintiff does not allege that such interactivity was targeted to United States users. *See Holland*, 485 F.3d at 462 (no jurisdiction under Rule 4(k)(2) where defendant's website "is not targeted to the United States"); *DFSB Kollective Co. v. Bourne*, 897 F. Supp. 2d 871, 882 (N.D. Cal. 2012) (rejecting argument that "any defendant that operates a commercial website with infringing content which requires users to register with the site can be haled into court in any state in the United States because the defendant has directed its activities at each state regardless of whether or how that registration information is used"); *be2 LLC v. Ivanov*,

[4] The Complaint appears to assert jurisdiction under Rule 4(k)(2), but without specifically citing the rule. *See* FAC ¶ 8 ("This Court has personal jurisdiction over Defendant because it conducts business in the United States (including in the State of California), it purposefully directs its business activities toward residents of the United States, and the events underlying this lawsuit arose out of Defendant's business activities in the United States."). If Plaintiff is claiming jurisdiction based on Hytto's contacts with California, personal jurisdiction is also lacking because Plaintiff is a Georgia citizen who does not claim to have purchased her toy or used the App in California. This Court's exercise of jurisdiction would also be unreasonable under the factors set forth in *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004).

642 F.3d 555, 559 (7th Cir. 2011) ("If the defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution.").

Second, the sale of products into the United States does not suffice to establish specific jurisdiction. "Random, fortuitous, or attenuated contacts with individuals in the forum are insufficient to support personal jurisdiction." *Adobe Systems Inc.*, 2015 WL 5834135, at *5 (internal quotations and citations omitted). Plaintiff does not allege in any non-conclusory way that Hytto targets advertisements to the U.S., markets products specifically intended for a U.S. audience, or in any other way directs its sales activities to the U.S. as opposed to elsewhere. *Id.* Under such circumstances, there is no express aiming. *Id; see also Imageline, Inc. v. Hendricks*, 2009 WL 10286181, at *4 (C.D. Cal. Aug. 12, 2009) (holding that defendants' sales to forum residents were not specifically directed contacts, but instead occurred only because the purchasers happened to reside there); *Warner Bros. Home Entm't, Inc. v. Shi*, 2013 WL 12116586, at *5 (C.D. Cal. Jan. 29, 2013) (no prima facie case for express aiming without allegations of specific intent to target forum consumers).

Third, Hytto's use of "California-based" social media companies for marketing also does not manufacture jurisdiction. *See, e.g., NuboNau, Inc. v. NB Labs, Ltd*, 2012 WL 843503, at *6 (S.D. Cal. Mar. 9, 2012) ("[T]he Court doesn't find that merely engaging Twitter and Facebook to promote one's business constitutes purposeful direction at California, simply because Twitter and Facebook happen to be based there."); *Pooka Pooka LLC v. Safari Beach Club*, 2013 WL 12203872, at *5 (N.D. Cal. Apr. 17, 2013) (accepting notion that use of California headquartered Internet companies is sufficient to establish jurisdiction "**would render the 'expressly aimed' prong of the *Calder* test essentially meaningless as it has become ubiquitous for businesses-large and small-to maintain Facebook and/or other similar accounts for marketing purposes . . .**") (emphasis in original).

II. Plaintiff's Claims Should Be Dismissed Under Rule 12(b)(6)

Even if jurisdiction existed, Plaintiff fails to state a claim under Rule 12(b)(6). A complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on

its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Labels, conclusions and "formulaic recitation[s]" will not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Stripping away labels and conclusions, the Amended Complaint states no plausible claim.

A. Plaintiff's Wiretap Act Claim Should Be Dismissed

Plaintiff asks this court to do two things that no court has done before: (1) apply the Wiretap Act to local Bluetooth communications; and (2) treat pre-programmed remote control signals from one device to another as "contents" of communications. No court has ever taken either step because they are both wrong. Plaintiff's Wiretap Act claim must be dismissed because she does not properly allege an interception in interstate commerce involving the contents of an electronic communication. Even if she did, the allegations describe conduct expressly permitted by the Act.

1. The FAC Lacks the Basic Elements of a Wiretap Act Claim

The Wiretap Act makes it unlawful to "intentionally intercept[ ] [or] endeavor[ ] to intercept . . . any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). The Act defines "intercept" as the acquisition of "contents" of any "electronic communication" through the use of any electronic, mechanical, or other device. 18 U.S.C. § 2510(4). To qualify as an "electronic communication," the data must be "transmitted in whole or in part by a . . . ***system that affects interstate or foreign commerce***." *Id.* § 2510(12) (emphasis added). Plaintiff thus must allege Hytto (a) intercepted contents of an electronic communication (b) transmitted via a system affecting interstate commerce. *Rene v. G.F. Fishers, Inc.*, 817 F. Supp. 2d 1090, 1093 (S.D. Ind. 2011). She fails on both.

Plaintiff attempts to sensationalize her complaint by alleging that App users can communicate by text and video chat—but she does *not* allege that Hytto intercepted those communications. She alleges only that Hytto intercepted "Usage Information," *i.e.* pre-programmed *operational instructions* such as the device's intensity level. *See* FAC ¶¶ 29, 37. Plaintiff alleges that (1) a partner sends Usage Information from his or her App to another user's App; (2) that user's App transmits the Usage Information to the Lovense device via Bluetooth; and (3) Hytto "intercepts" the Bluetooth transmission of the Usage Information from the App to the

Lovense device. *See* FAC ¶ 37 ("whenever Body Chat App users interact with their Lovense device through the Body Chat App—including by using the 'Long Distance Control' feature—Defendant intercepts the content of all interactions sent to the Lovense device."). Stripped of allegations unrelated to the interception, Plaintiff has a single complaint: Hytto records what commands are entered into the Body Chat App and sent to the toy via Bluetooth. This does not state a claim.

(i) Bluetooth Transmissions Do Not Affect Interstate Commerce

First, the interception did not occur on "a system that affects interstate or foreign commerce." *See* 18 U.S.C. § 2510(12). Bluetooth is a local transmission system between two physically proximate devices that does not touch interstate commerce. To avoid this fatality, Plaintiff tries to narrow her claim to only those instances where class members use their toy with a partner. *See* FAC ¶ 50. But the actual (and fatally flawed) interception allegation remains the same: Hytto allegedly intercepted the Bluetooth transmission of Usage Information from the App to the toy.

A Bluetooth transmission between a smartphone app and a wireless device is like a transmission between a keyboard and a computer, which courts repeatedly find outside the scope of the Wiretap Act. In *United States v. Barrington*, college students installed keylogger software on computers to acquire employees' passwords and then used those passwords to change their grades. *Id*. at 648 F.3d 1178, 1183–84 (11th Cir. 2011). The software "covertly recorded the keystrokes made by Registrar employees as they signed onto their computers, capturing their usernames and passwords," and then automatically transmitted them to the students' email accounts. *Id*. Because there was no evidence that the software had the capacity to intercept information being transmitted beyond the user's computer, the Eleventh Circuit found that the software was not a device that could be used to intercept an electronic communication. *Id* at 1202–3. The court reasoned that "use of a keylogger will not violate the Wiretap Act if the signal or information captured from the keystrokes is not at that time being transmitted beyond the computer on which the keylogger is installed (or being otherwise transmitted by a system that affects interstate commerce)." *Id.* at 1202.

The court in *Rene v. G.F. Fishers, Inc.* reached the same conclusion. There, plaintiff alleged that use of a keystroke logger to intercept the transmission of her keystrokes as she typed passwords into a computer violated the Wiretap Act. *Rene*, 817 F. Supp. 2d at 1093. Defendants moved to dismiss, arguing that there could be no Wiretap Act "interception" because the system transmitting information between the keyboard and computer did not affect interstate or foreign commerce. *Id.* The district court, adopting *Barrington*, agreed, finding that in order to violate the Wiretap Act the "interception must occur while the transmission is traveling through a system that affects interstate or foreign commerce." *Id.* at 1093-94. The court explained:

> The key to the *Barrington* decision lies in the fact that the transmission of keystrokes exists internally on a computer. The relevant 'interception' acted on a system that operated solely between the keyboard and the local computer, and captured a transmission that required no connection with interstate or foreign commerce to reach its destination. *Id.* at 1094.

Other courts have reached similar conclusions.[5]

In an effort to distinguish this case from the keylogger cases, Plaintiff alleges that Usage Information *previously* traveled in interstate commerce. But this is irrelevant. In *Rene*, the defendants allegedly intercepted their coworker's keystrokes as she accessed her personal email and checking accounts on the Internet. 817 F. Supp. 2d at 1092. But the court found that to violate the Wiretap Act, the interception "must occur while the transmission is traveling through a system that affects interstate or foreign commerce." *Id*. at 1094. The fact that the keystrokes were traversing the Internet simultaneously as plaintiff accessed online banking or sent emails did not change the fact that the plaintiff's Wiretap Act allegation concerned only a system that did *not* affect interstate commerce. *Ropp* likewise found that a keyboard-computer system did not affect

[5] *See United States v. Ropp*, 347 F. Supp. 2d 831, 834 (C.D. Cal. 2004) (holding that whether intercepted signals were electronic communications "turns on whether the signals were transmitted 'by a system . . . that affects interstate or foreign commerce'"); *United States v. Scarfo*, 180 F. Supp. 2d 572, 581 (D.N.J. 2001) (dismissing Wiretap Act indictment where software did not "search for and record data entering or exiting the computer from the transmission pathway through the modem attached to the computer"); *Krise v. SEI/Aaron's Inc.*, 2017 WL 3608189, at *10 (N.D. Ga. Aug. 22, 2017) (software capturing transmissions between keyboard and computer not capturing electronic communications affecting interstate commerce), *appeal dismissed sub nom., Whalen v. SEI/Aaron's, Inc.*, 2018 WL 1419868 (11th Cir. Jan. 25, 2018).

interstate commerce, even when composing emails transmitted over the Internet. 347 F. Supp. 2d 831, 837-38 (C.D. Cal. 2004). The same reasoning applies here—the local toy-App communication is not itself on a system affecting interstate commerce, even if the information going to the toy originated from a partner (who could be in another state or also the same room).[6]

(ii) Device Control Commands Are Not the "Content" of an Electronic Communication Under the Wiretap Act

Plaintiff's claim also fails because Usage Information is not "content" under the Wiretap Act. The Act defines "content" as "information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). "Congress intended the word 'content' to mean a person's intended message to another (i.e., the 'essential part; of the communication, the 'meaning conveyed' and the 'thing one intends to convey.')" *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1106 (9th Cir. 2014). Emails are a prime example of "content" falling within the Wiretap Act.

Usage Information (e.g. date and time of use and vibration level) is not "content." Usage Information lacks words and any intended message. Usage Information is just directions entered into the App causing it to vary the speed of the sex toy, the same way another App might control the speed of a ceiling fan. If operational commands were "content" under the Wiretap Act, the Act would encompass remote control signals sent by hundreds of devices, such as thermostats, televisions, lights, fans, car ignitions, or any other item that can be remotely controlled.

Courts reject this broad reading of "content." In *In re Zynga*, the Ninth Circuit held that referrer header information—the portion of a webpage that provides the address of the webpage from which the request was sent—did not meet the Wiretap Act definition of "content." *Id.* at 1106-7. The court explained that "the term 'contents' refers to the intended message conveyed by the communication, and does not include record information regarding the characteristics of the

[6] Also irrelevant is Plaintiff's allegation that the intercepted information was subsequently transmitted to Hytto's servers. *See* FAC ¶ 38. In both *Barrington* and *Rene*, the intercepted keystrokes were automatically emailed to defendants over a network connection affecting interstate commerce (the email servers of the email provider), but that did not change the result. *See Barrington*, 648 F.3d at 1184; *Rene*, 817 F. Supp. 2d at 1092. Indeed, *Ropp* expressly rejected such an argument, finding that "[t]he network connection [was] irrelevant to the transmissions, which could have been made on a stand-alone computer that had no link at all to the internet or any other external network." 347 F. Supp. 2d at 838. So too here.

message that is generated in the course of the communication." *Id.* Webpage addresses merely identified the location of the webpage a user is viewing on the Internet and conveyed no meaning to qualify as content under the Act. *Id.* at 1107. Similarly, in *In re Facebook Internet Tracking Litig.*, 140 F. Supp. 3d 922 (N.D. Cal. 2015), the court held that the identity of webpages that the users visited and the users' unique identification information did not qualify as content under the Wiretap Act. *Id.* at 935. The court reached this decision even though Facebook could indisputably glean information about a person based on their browser history.

So too here. Usage Information is not the "essential part" of a communication by Plaintiff or a "thing she intends to convey" to anyone. *In re Zynga Privacy Litig.*, 750 F.3d at 1106. Nor is it information she "intended to communicate, such as words spoken in a phone call." *In re iPhone Application Litig.*, 844 F.Supp.2d 1040, 1061 (N.D. Cal. 2012). It is simply transactional records generated when the App controls the settings on the vibrator. The fact that the vibration levels are selected using the App as opposed to a + or – button on the toy itself does not make records of those levels "contents" under the Wiretap Act. *See United States v. Reed*, 575 F.3d 900, 916 (9th Cir. 2009) (noting, "data that is incidental to the use of a communication device" contains no "content or information that the parties intended to communicate").

2. Dismissal is Also Warranted Because Plaintiff Alleges Conduct Expressly Permitted by the Wiretap Act

Plaintiff's Wiretap Act claims must also be dismissed because the alleged conduct is permitted by the Act. *See, e.g.*, 18 U.S.C. § 2511(1)(d)-(i).

(i) A Party to the Communication Cannot be Liable for Interception

A party to a communication does not intercept that communication. The Wiretap Act thus precludes liability where a party "acted as no more than the second party to [that] communication." *Crowley v. CyberSource Corp.*, 166 F. Supp. 2d 1263, 1269 (N.D. Cal. 2001).

But Plaintiff claims that the Hytto App intercepts Usage Information a user inputs into the Hytto App—alleging that when users "interact with a Lovense device through the Body Chat App . . . Defendant intercepts the content of all interactions sent to the Lovense devices." FAC ¶ 37; *see also id.* ¶ 36 ("Defendant programmed the Body Chat App to secretly capture intimate

details . . . including . . . the vibration intensity selected by App users."). These are not allegations of interception; they are allegations that the App records how it is used—like apps do. Plaintiff takes no issue with the App collecting Usage Information directly, since she or a partner submitted it to the App. Instead, she takes issue with Hytto "intercepting" that Usage Information when it is transmitted to the toy. But even accepting as true Plaintiff's mischaracterization that Usage Information sent between the App on Plaintiff's phone and the toy is being intercepted (as opposed to merely collected by the App), there can be no Wiretap claim because Hytto—as the App provider—was the second party to that "communication."

Wiretap Act cases brought against companies who placed cookies on computers to facilitate internet advertising provide a useful parallel. In *In re Google Cookie Placement*, plaintiffs alleged that internet advertisers acquired the plaintiffs' internet history when, in the course of requesting webpage advertising content, the plaintiffs' browsers sent information to defendants via a cookie defendants placed on their computers. 806 F.3d 125, 142 (3d Cir. 2015), *cert. denied sub nom., Gourley v. Google, Inc.*, 137 S. Ct. 36 (2016) (Mem.). The theory was that once placed, the cookie would "intercept" plaintiffs' communications and transmit them back to defendants. The Third Circuit affirmed dismissal of the Wiretap Act claim on the ground that defendants were parties to the communication. *Id*.; *see also United States v. Pasha*, 332 F.2d 193, 198 (7th Cir. 1964) (noting that "officer did not 'intercept' a message while it was en route to another; there was no other on the line"); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016) (affirming Wiretap Act dismissal where "Google was either a party to all communications with the plaintiffs' computers" or allowed to communicate with them by a party), *cert. denied sub nom., C.A.F. v. Viacom Inc.*, 137 S. Ct. 624 (2017).

Here, Body Chat users input Usage Information into the App, to be transmitted from the App to the toy. In other words, the App, i.e. Hytto, is the sender of the communication. If Hytto is not a party to the communication, there is no second party—Plaintiff (or her partner) would simply be communicating with themselves in much the same way they may use a remote control to communicate with a TV in the same room, or an app to fly a drone. No court has found the Wiretap Act applies to such communications.

(ii) Collection of the Usage Information is Otherwise Subject to the Wiretap Act's Ordinary Course of Business Exception

Finally, Plaintiff's Wiretap Act claim fails because the alleged interception falls within the Wiretap Act's ordinary course of business exception. *See* 18 U.S.C. § 2510(5)(a) (excluding from definition of intercept those devices being used by a provider in the ordinary course of its business). Even those district courts construing the exception narrowly find that it applies "where an electronic communication service provider's interception facilitates the transmission of the communication at issue or is incidental to the transmission of such communication." *In re Google Inc.*, 2013 WL 5423918, at *8 (N.D. Cal. Sept. 26, 2013).

Plaintiff's own allegations demonstrate this is the case here. The Amended Complaint claims that the App was designed to pair with a user's toy to control the toy. *See* FAC ¶ 29. Indeed, it calls the toy's ability to be controlled by the App the toy's "defining feature." *Id.* ¶ 35. Hytto's collection of Usage Information facilitates that function and thus falls within the ordinary course exception. *See, e.g., In re Google, Inc. Privacy Policy Litig.*, 2013 WL 6248499, at * 10 (N.D. Cal. Dec. 3, 2013) (finding that Google's collection of information for purposes of its "core targeted advertising" satisfied ordinary course exception); *see also Hall v. Earthlink Network Inc.*, 396 F.3d 500 (2d Cir. 2005) (finding that Earthlink's continued processing of email after user cancelled account satisfied ordinary course exception where Earthlink processed such email using its routers, servers and other computer equipment as part of its e-email service to all customers).

C. Plaintiff's Common Law Claims Should Be Dismissed

The Court should also dismiss Plaintiff's intrusion upon seclusion and unjust enrichment claims, both of which fail as a matter of law.[7] Intrusion upon seclusion requires: (1) an intrusion into a private place, conversation, or matter, (2) in a manner highly offensive to a reasonable person. *Taus v. Loftus*, 40 Cal. 4th 683, 725 (2007). But there can be no intrusion (much less a highly offensive one) where Hytto was a party to the communication. *Robinson v. Renown Reg'l*

[7] Where federal claims fail, pendent state law claims should be dismissed. *See, e.g., Hodge v. Mountain States Tel. & Tel.* Co., 555 F.2d 254, 261 (9th Cir. 1977).

Med. Ctr., 2016 WL 7031910, at *4 (D. Nev. Aug. 23, 2016) (no intrusion on a reasonable expectation of privacy in words already conveyed to a third party). And because it is commonly understood that when a person uses an app, the app collects information about that usage, such "routine internet functionality" is not "highly offensive," regardless of the device used, whether headphones, a drone, or an adult toy. *See In re Facebook Internet Tracking Litig.*, 263 F. Supp. 3d 836, 846 (N.D. Cal. 2017); *see also In re Google, Inc. Privacy Policy Litig.*, 58 F. Supp. 3d 968, 988 (N.D. Cal. 2014) (finding Google's collection of browsing histories (which could include sexual content), "do[es] not plausibly rise" to the necessary level of intrusion).

Plaintiff also has not adequately alleged a claim for unjust enrichment. Courts in this district require an unjust enrichment claim to be asserted under a specific state's law. *Yan Mei Zheng-Lawson v. Toyota Motor Corp.*, 2018 WL 2298963, at *3 (N.D. Cal. May 21, 2018) (holding that where unjust enrichment is not asserted under California law or under any particular state's law, it is subject to dismissal on that basis); *see also In re TFT–LCD (Flat Panel) Antitrust Litig.*, 781 F. Supp. 2d 955, 966 (N.D. Cal. 2011) ("Several other courts in this district have similarly held that a plaintiff must specify the state under which it brings an unjust enrichment claim."). Plaintiff's unjust enrichment claim is not asserted under California law, or any other state's law, and should be dismissed for that reason alone. *See* FAC ¶¶ 68-74.

Her unjust enrichment claim also fails because under California law, unjust enrichment requires: (1) receipt of a benefit; and (2) unjust retention of the benefit at the expense of another. *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000). Plaintiff does not allege in a non-conclusory manner what benefits Hytto unjustly retained at her expense. Plaintiff received the toy and functionality she purchased. Hytto's receipt and retention of the purchase price cannot be "unjust." And Plaintiff does not adequately allege that by downloading the free App she conveyed a benefit to Hytto that can (let alone should) be returned.

CONCLUSION

Based on the foregoing, Hytto respectfully requests dismissal of this action based on a lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

DATED: September 27, 2018

ZWILLGEN LAW LLP

By: /s/ Anna Hsia

Anna Hsia (SBN 234179)
anna@zwillgen.com
Jeffrey Landis (admitted *Pro Hac Vice*)
jeff@zwillgen.com
Attorneys for Defendant
Hytto Ltd., d/b/a Lovense